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RE: Comment to Proposed Amendment No. 11

Dear Mr. Courlander:

On behalf of our firm's Business Crimes Practice Group, we are writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Federal Sentencing Guidelines as published in the December 21, 1993, edition of the Federal Register (Vol. 58, No. 243, Part V). In particular, we wish to comment on and recommend the adoption of a form of the proposed Amendment No. 11, which would revise and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2. These sections currently govern, in most circumstances, convictions for money laundering offenses under 18 U.S.C. §§ 1956 and 1957.

The proposed amendment reflects a fundamental philosophical change in the sentencing of federal money laundering offenses. The amendment proposes to combine those two guideline sections and to tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal monetary proceeds.

Our recent experiences suggest that the Commission's proposed Amendment represents a much needed change from the

current guidelines approach which may and, in our experience, does encourage federal prosecutors to pursue money laundering charges in non-narcotics cases simply because the resulting sentences under the money laundering guidelines sections are far harsher than for the underlying offense(s). As the Commission is certainly well aware, particularly in straight-forward fraud cases ordinarily sentenced under Section 2F1.1, the element of proof needed to establish the § 1956 or § 1957 violation is almost always present -- the receipt, use, and/or deposit of the proceeds of the fraud. See, e.g., United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991). While the Commission's original structuring of Guideline §§ 2S1.1 and 2S1.2 may have been consistent with the Congressional intent of severely punishing the use of funds derived from drug trafficking, the application of those sections to non-drug-related offenses is simply draconian. In fact, as the October 14, 1992, Report to the Sentencing Commission Staff Director from the Commission's Money Laundering Working Group fully demonstrates, the government has routinely been able to obtain a significantly higher guideline sentencing range than would result from a calculation of the guideline section normally applicable to the underlying offense, simply by adding a violation of either 18 U.S.C. § 1956 or § 1957 to the indictment.

An additional reason for attempting to tie the Guidelines section for a money laundering conviction more closely to the offense level for the underlying conduct is to remove the incentive for prosecutors to influence plea negotiations by either threatening to include or actually including in an indictment counts charging violations of either § 1956 or § 1957. The proposed Amendment addresses this problem and will ultimately help the Commission achieve its stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, ¶ 3.

While we strongly support the proposed Amendment, we also urge the Commission to modify the proposed Amendment to better achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived." With respect to proposed § 2S1.1(a), we suggest that the base offense level for the underlying substantive offense should be the base level for use in the money laundering guideline section calculation (absent any otherwise appropriate departure). Accordingly, we respectfully disagree with the proposal that the base offense level for the underlying offense be applied only where that base offense level would exceed the base offense levels set forth in proposed subsections (a)(2) and (a)(3). Instead, we suggest that after the underlying offense base level is determined, the revised section 2S1.1 then provide for an increase by an established number of levels to reflect any additional

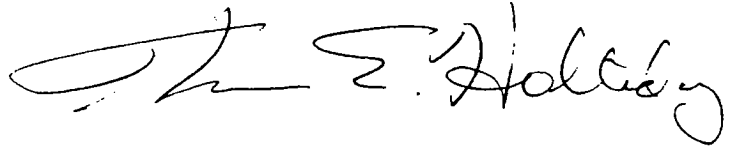
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punishable conduct comprising the money laundering offense, such as has been done in proposed subsection (b).

Alternatively, we propose that the base offense level in proposed § 2S1.1(a)(3) be the same as the base offense level for "fraud and deceit" under Guidelines § 2F1.1. In that manner, the base offense level for money laundering under § 2S1.1(a)(3) would be six, plus the number of offense levels from the 2F1.1 fraud table, depending upon the amount of the funds laundered. This has the benefit of uniformity and eliminates the severe effect of this guideline on prosecutors' charging decisions in "run-of-the-mill" fraud cases.

In sum, however, we believe the proposed changes to the money laundering guidelines are much needed and long overdue, and we support the Commission's efforts in this regard.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J. E. Hattery", is written over the typed name.

Gibson, Dunn & Crutcher

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